Supreme Court, U.S.
FILED
APR 04 2000
CLERK

(2)

No. 99-1521

IN THE
SUPREME COURT OF THE UNITED STATES

ESTATES OF RED WOLF AND BULL TAIL,
VALERIE RED WOLF, GLADYS RED WOLF,
RANDY RED WOLF, DORRIE BULL TAIL
and DEWEY BULL TAIL,
Petitioners,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT CROW TRIBE'S BRIEF IN SUPPORT

RECEIVED
APR 5 - 2000
OFFICE OF THE CLERK
SUPREME COURT, U.S.

ROBERT S. PELCYGER
JOHN FREDERICKS III *
FREDERICKS, PELCYGER & HESTER, LLC
1075 S. BOULDER RD., STE. 305
LOUISVILLE, CO 80027
(303) 673-9600

Counsel for Respondent
Crow Tribe of Indians

* Counsel of Record

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

2400

QUESTIONS PRESENTED

1. Whether the Crow Tribal Courts' have jurisdiction over a wrongful death action brought by injured Crow tribal members when the cause of action arises on the Crow Indian Reservation, on a railroad right-of-way which crosses Crow trust land.

2. Whether tribal consent to state court jurisdiction pursuant to Public Law 280, as amended, 25 U.S.C. § 1326, is mandatory before a tribal member may be excluded from seeking redress in tribal court for a reservation-based cause of action.

3. Whether the parties are required to exhaust their tribal court remedies when a civil cause of action involving tribal members arises on the reservation and there is a colorable claim of tribal jurisdiction.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

CITATION OF OPINION BELOW 1

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THIS CASE 1

I. THE CROW TREATY 2

II. THE CROW LAW AND ORDER CODE 3

STATEMENT OF THE CASE 8

ARGUMENT 9

I. The Court Should Grant the Petition for Certiorari Because the Ninth Circuit Has Decided an Important Question of Federal Law in a Way Which conflicts with Prior Decisions of this Court 10

A. Burlington Northern's Right-of-Way Is Not Equivalent to Fee Land 10

B. The Holding in Strate Cannot Be Extended to Civil Actions in Which Tribal Members Are Parties 13

C. The Ninth Circuit's Decision Conflicts with Acts of Congress and Federal Policy 15

D. The Ninth Circuit's Decision Excusing the Parties from Exhausting Their Tribal Court Remedies Conflicts with this Court's Previous Deceisions in National Farmers Union Insurance Co. v. Crow Tribe, and Iowa Mutual Insurance Co. v. La Plante 19

II. This Court Should Grant Certiorari Under Rule 10(a) Because the Ninth Circuit's Decision Conflicts With Decisions of Other Court's Of Appeal . . 22

III. This Court Should Grant the Petition for Certiorari Because the Ninth Circuit Has Decided an Important Question of Federal Law That Has Not Been, But Should Be, Settled By This Court 25

CONCLUSION 26

TABLE OF AUTHORITIES

Cases

A-1 Contractors v. Strate, et al.,
76 F.3d 930 (8th Cir. 1996), *aff'd*,
520 U.S. 438 (1997) 23, 24

Babbitt Ford, Inc. v. Navajo Indian Tribe,
710 F.2d 587 (9th Cir. 1983),
cert. denied, 466 U.S. 926 (1984) 25

Burlington Northern R. Co. v. Red Wolf, et al.,
196 F.3d 1059 (9th Cir. 1999) 1

El Paso Natural Gas Co. v. Neztsosie,
526 U.S. 473 (1999) 13, 20, 21

Hinshaw v. Mahler,
42 F.3d 1178 (9th Cir. 1994),
cert. denied, 513 U.S. 988 (1994) 25

Iowa Mutual Insurance Co. v. LaPlante,
480 U.S. 9 (1987) . . . . . *passim*

Kennerly v. District Court,
400 U.S. 423 (1971) 18

Kerr-McGee Corp. v. Farley,
115 F.3d 1498 (10th Cir. 1997),
cert. denied, 522 U.S. 1090 (1998) 12, 22

McClanahan v. Arizona Tax Commission,
411 U.S. 164 (1973) 9, 11

Merrion v. Jicarilla Apache Tribe,
455 U.S. 130 (1982) 14, 23, 24

Montana v. Blackfeet Tribe,
471 U.S. 759 (1985) 11

Montana v. U.S. EPA,
137 F.3d 1135 (9th Cir. 1998),
cert. denied, 525 U.S. 921 (1998) 25-26

Montana v. United States,
450 U.S. 544 (1981) 10, 23

National Farmers Union Insurance Co. v. Crow Tribe,
471 U.S. 845 (1985) . . . . . *passim*

New Mexico v. Mescalero Apache Tribe,
462 U.S. 324 (1983) 13-14

Oneida v. Oneida Indian Nation,
470 U.S. 226 (1985) 10, 11

Santa Clara Pueblo v. Martinez,
436 U.S. 49 (1978) . . . . . *passim*

South Dakota v. Bourland,
508 U.S. 679 (1993) 11

Strate v. A-1 Contractors, et al.,
520 U.S. 438 (1997) . . . . . *passim*

Three Affiliated Tribes v. Wold Engineering,
467 U.S. 138 (1984) 18

U.S. v. Santa Fe Pacific Railroad,
314 U.S. 339 (1941) 10, 11

U.S. v. Soldana,
246 U.S. 530 (1918) 10, 11, 12

Williams v. Lee,
358 U.S. 217 (1959) . . . . . *passim*

Wilson v. Marchington,
127 F.3d 805 (9th Cir. 1997),
cert. denied, 523 U.S. 1074 (1998) 26

Statutes

25 U.S.C. § 1326 . . . . . i, 18

25 U.S.C. § 3601 16

Crow Treaty of 1868, 15 Stat. 649 (May 7, 1868) . 1, 2, 9

Indian Tribal Justice Act of 1993, § 3601 *et seq.* . . *passim*

Other

Charles F. Wilkinson & John M. Volkman,
Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows or Grass Grows Upon the Earth"–How Long a Time is that?,
63 Cal. L. Rev. 601 (1975) 11

Crow Tribal Law and Order Code 1, 3, 8

Exec. Order No. 13084, 63 Fed. Reg. 27655 (1998) 17

Felix S. Cohen's Handbook of Federal Indian Law, (1982 Ed.) 24

H.R. REP. No. 205, 103RD CONG. 1ST SESS. (1993) 17

S.REP. NO. 88, 103RD CONG. 1ST SESS. 8 (1993) 16

INTRODUCTION

The Respondent Crow Tribe of Indians files this brief in support of the Petition for Certiorari filed by the Estates of Red Wolf and Bull Tail, et al. (hereinafter referred to as the "Red Wolf Estates").[1] This brief is filed in accordance with the requirements of Supreme Court Rules 12.6 and 24.2.

CITATION OF OPINION BELOW

The opinion of the court of appeals, as amended, is reported and cited as Burlington Northern R. Co. v. Red Wolf, et al., 196 F.3d 1059 (9th Cir. 1999).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THIS CASE.

In addition to the statutes cited in the Appendix to the Petition for Certiorari filed by the Red Wolf Estates, this case involves sections 1 and 2 of the Crow Treaty of 1868, 15 Stat.

---

[1] The Crow Tribe's motion to intervene in the district court action was denied on the same day that the district court entered judgment in favor of Burlington Northern. The Tribe appealed the denial of its motion to intervene, and filed a protective notice of appeal from the district court's judgment on the merits, in accordance with accepted Ninth Circuit practice. The Ninth Circuit consolidated the Crow Tribe's appeals with the Red Wolf estates' appeal.

649 (May 7, 1868), and relevant portions of the Crow Tribal Law and Order Code.

I. THE CROW TREATY

The relevant provisions of Articles 1 and 2 of the Crow treaty of 1868 provide as follows:

> Article 1. From this day forward peace between the parties to this treaty shall forever continue. The Government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they hereby pledge their honor to maintain it. If bad men among the whites or among other people, subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.
>
> . . .
>
> Article 2. The United States agrees that the following district of country, to wit: commencing where the 107th degree of longitude west of Greenwich crosses the south boundary of Montana Territory; thence north along said 107th meridian to the mid-channel of the Yellowstone River; thence up said mid-

channel of the Yellowstone to the point where it crosses the said southern boundary of Montana, being the 15th degree of north latitude; and thence east along said parallel of latitude to the place of beginning, shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons, except those herein designated and authorized so to do, and except such officers, agents, and employees of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians, and henceforth they will, and do hereby, relinquish all title, claims, or rights in and to any portion of the territory of the United States, except such as is embraced within the limits aforesaid.

II. THE CROW LAW AND ORDER CODE

The relevant provisions of the federally authorized and approved Crow Law and Order Code establishing the Crow Tribal Court and Court of Appeals state as follows:

TITLE 3. ESTABLISHMENT OF TRIBAL COURTS AND TRIBAL JURISDICTION

CHAPTER I. ESTABLISHMENT OF CROW TRIBAL COURTS

3-1-101. Crow Tribal Court.

(1) There is hereby established the "Crow Tribal Court."

(2) The Crow Tribal Court shall be a court of general civil and criminal jurisdiction and shall hear appeals from final decisions of:

(a) Tribal administrative bodies.

(b) The "small claims" session of the Crow Tribal Court.

. . .

3-1-103. Crow Court of Appeals.

(1) There is hereby established the "Crow Court of Appeals."

(2) The Crow Court of Appeals shall have original and exclusive jurisdiction to hear all appeals from final judgments

and/or orders of the Crow Tribal Court and the Crow Juvenile Court.

CHAPTER II. JURISDICTION OF CROW TRIBAL COURTS

3-2-201. Policy.

It is the intention of the Crow Tribe of Indians to exercise that jurisdictional authority which has not otherwise been enclosed by acts of the United States Congress and failure to legislate in a particular area shall not be deemed a waiver of that authority. The jurisdiction of the Crow Tribal Courts shall be used to insure due process and equal protection of the law for all persons residing within the exterior and entering the boundaries of the Crow Indian Reservation.

3-2-202. Jurisdiction–Territorial.

The jurisdiction of the Crow Tribal Courts shall extend to any and all lands within the exterior boundaries of the Crow Indian Reservation as the same may exist from time to time including all easements, rights-of-way, and fee patented lands within such boundaries.

3-2-203. Jurisdiction–Personal.

(1) The Crow Tribal Court shall have jurisdiction over all

persons who reside, enter, and/or transact business within the exterior boundaries of the Crow Indian Reservation, provided that the Court shall not exercise criminal jurisdiction over non-Indians.

(2) For purposes of jurisdiction "persons" shall include individuals, businesses, partnerships, associations, cooperatives, and corporations.

3-2-204. Jurisdiction–Property.

(1) The Crow Tribal Court shall have jurisdiction over all property, real and personal, which is located within the exterior boundaries of the Crow Indian Reservation. Such jurisdiction shall extend to the determination of ownership rights in property, interests in property, and the application of property to the satisfaction of a judgment for which the owner of the property is deemed to be liable.

(2) The jurisdiction of the Crow Tribal Courts shall be limited only by federal law; provided however, that the Crow Tribal

Court shall have jurisdiction to render money judgments against persons, businesses, partnerships, corporations, and cooperative associations who are not subject personally to the jurisdiction of the court only if the action is commenced by an attachment of the defendant's property which is located within the exterior boundaries of the Crow Indian Reservation. Unless the defendant subjects himself to the jurisdiction of the court, any judgment in an action commenced by the attachment of property belonging to a party not personally subject to the jurisdiction of the court may be executed only against the property actually attached.

3-2-205. Jurisdiction-Subject Matter.

The Crow Tribal Courts shall have jurisdiction over all civil causes of action arising within the exterior boundaries of the Crow Indian Reservation and over all criminal offenses which are enumerated in Title 8 of the Crow Tribal Code and which are committed within the exterior boundaries of the Crow Indian Reservation.

STATEMENT OF THE CASE

In accordance with Supreme Court Rule 24.2, the Respondent Crow Tribe agrees with Petitioners' Statement of the Case, with the following clarifications.

First, the reservation land upon which the train accident occurred is not owned by the Crow Tribe in fee simple absolute. Instead, the land is tribal land, legal title to which is held in trust by the United States for the benefit of the Crow Tribe. Indian land of this type is commonly referred to as tribal trust land. The train accident which killed members of the Red Wolf and Bull Tail families occurred at the intersection where a tribal road crosses Burlington Northern's railroad tracks, within the 150 foot right-of-way granted by Congress to Burlington Northern's predecessor in interest. Thus, the accident occurred on tribal trust land, not land "owned in fee simple absolute title by the Crow Tribe." (*See* Petition for Certiorari at p. 8.)

Second, the Crow Tribal Law and Order Code, adopted pursuant to federal law and the Crow Tribe's federally approved Constitution, expressly provides for the exercise of civil jurisdiction over an action which occurs on the reservation and results in the death of a tribal member. (Crow Law and Order Code, §§ 3-2-202 - 203, 3-2-205.)

Third, the Crow Indian Reservation, where the train accident occurred, was established by the Treaty of 1868 between the Crow Tribe and the United States. The treaty was a treaty of peace between the Crow Tribe and the United States under which the Tribe relinquished its title to millions of acres of land to the United States. In return, the United States promised that the remaining Crow Reservation would be "set apart for the absolute and undisturbed use and

occupation" of the Crow Indians. (Treaty with the Crows, Articles 1, 2.) Like the Navajo treaty of 1868, Articles 1 and 2 of the Crow treaty reserved to the Crows a portion of their traditional territory. Thus, "[i]n return for their promises to keep peace, this treaty 'set apart' for 'their permanent home' a portion of what had been their native country." McClanahan v. Arizona Tax Commission, 411 U.S. 164, 174 (1973); quoting Williams v. Lee, 358 U.S. 217, 223 (1959). This Court has held that this treaty language established the reservation "within the exclusive sovereignty of the Tribe under general federal supervision." McClanahan, 411 U.S. at 175; Williams, 358 U.S. at 222-23. The rights which the Crow Tribe reserved under their treaty lie at the heart of this case.

ARGUMENT

This case presents an opportunity for the Court to clarify its holding in Strate v. A-1 Contractors, et al., 520 U.S. 438 (1997), and to harmonize its decision in Strate in order to avoid conflict with its other Indian law decisions, most notably, Williams v. Lee, *supra*. This case also presents the opportunity for the Supreme Court to clarify the continuing vitality of the tribal court exhaustion doctrine first enunciated in National Farmers Union Insurance Co. v. Crow Tribe, 471 U.S. 845 (1985). This Court should grant the Petition for Certiorari because the Ninth Circuit's interpretation of Strate conflicts not only with other federal courts of appeals, but with controlling decisions of this Court. Moreover, the Ninth Circuit decision divests the tribal court of jurisdiction over actions which involve injured tribal members, an important question of federal law that has not been, but should be, settled by this Court. Review on a

Petition for Certiorari is therefore appropriate under Supreme Court Rule 10(a) and (c).

I. The Court Should Grant the Petition for Certiorari Because the Ninth Circuit Has Decided an Important Question of Federal Law in a Way Which Conflicts with Prior Decisions of this Court.

Relying on Strate, the Ninth Circuit held that the Crow tribal courts do not have jurisdiction to adjudicate the Red Wolf Estates' action against Burlington Northern because the railroad right-of-way within which the accident occurred was the equivalent of fee land under Strate, such that the main rule in Montana v. United States, 450 U.S. 544 (1981), applied. 196. F.3d at 1063. The Ninth Circuit then analyzed the two Montana exceptions to the main rule, and held that neither exception justified the exercise of tribal court jurisdiction. *Id.* at 1064-65. The Ninth Circuit's decision not only misconstrues Strate and Montana, it construes Strate in a way which brings it into direct conflict with other decisions of this Court.

A. Burlington Northern's Right-of-way Is Not Equivalent to Fee Land.

First, the Ninth Circuit's holding that Burlington Northern's right-of-way was the equivalent to fee land under this Court's analysis in Strate conflicts with the Court's earlier decisions in Oneida v. Oneida Indian Nation, 470 U.S. 226, 247-48 (1985), U.S. v. Soldana, 246 U.S. 530 (1918), and U.S. v. Santa Fe Pacific Railroad, 314 U.S. 339 (1941). This Court has consistently held that, because of the unique trust relationship between the United States and Indian tribes, congressional intent to extinguish Indian property or treaty rights must be "plain and unambiguous" and "will not be

lightly implied." Oneida, 470 U.S. at 247-48; Santa Fe Pacific, 314 U.S. at 346, 354; South Dakota v. Bourland, 508 U.S. 679, 687 (1993).[2] In Soldana, this Court held that the exact same right-of-way at issue in the case below did not extinguish the Crow Tribe's title and underlying property interest. 246 U.S. at 532-33. In Santa Fe, this Court held that the extinguishment of Indian title to their land is a matter over which Congress, not the courts, has supreme power. 314 U.S. at 347; *accord*, Oneida, 470 U.S. at 233-34.

Nothing in the congressional statute which granted Burlington Northern a right-of-way across the Crow Reservation indicates that it was intended to affect the Crow's underlying property interest in any way, shape or form. On the contrary, two sections of the statute granting the right-of-way support the opposite proposition, that Congress intended to protect the Tribe's underlying interest in the land over which the railroad was to be constructed. Section 3 of the Act provided that the construction and operation of the railroad "shall be conducted with due regard for the rights of the Indians. . . ." Section 5 of the Act declared that the grant of the right-of-way was on the condition that the railroad "will neither aid, advise, nor assist in any effort looking towards the changing or extinguishing the present tenure of the Indians in their land, and will not attempt to secure from the Indian

---

[2] There are a number of historical and moral reasons why the canons of construction employed by this Court require Indian treaties to be interpreted in favor of Indian Tribes. *See e.g.*, McClanahan, 411 U.S. at 174-175; Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985); *see also*, Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows or Grass Grows Upon the Earth"-How Long a Time is that?*, 63 Cal. L. Rev. 601, 610-17 (1975).

tribes any further grant of land or its occupancy than is hereinabove provided." Both of these sections were relied upon by this Court in Soldana to conclude that the congressional grant of a railroad right-of-way across the reservation did not affect the Crow Tribe's property rights. Soldana, 246 U.S. at 532.

Nothing in Strate even suggests that its holding is so broad as to encompass railroad or other commercial rights-of-way which cross Indian reservation land. The key factors in Strate which led the Court to conclude that the state highway was the equivalent of fee land were that the right-of-way was granted to the state, open to the public, traffic on the highway was subject to state control, and the tribe reserved no "gatekeeping" right. Strate, 520 U.S. at 454; *see* Kerr-McGee Corp. v. Farley, 115 F.3d 1498, 1506 n.4 (10th Cir. 1997), *cert. denied*, 522 U.S. 1090 (1998). The right-of-way at issue in this case is markedly different. There is no grant of any interest to the state of Montana. Burlington Northern's right-of-way is not open to the public, and maintenance and operation of the right-of-way is not subject to state control. Furthermore, both Congress and the Crow Tribe reserved important rights as conditions to the maintenance and operation of the right-of-way by the railroad. Those conditions, set forth in sections 3 and 5 of the right-of-way Act cited above, required Burlington Northern to operate the railroad with "due regard for the rights of the Indians" and to respect the "present tenure of the Indians in their land." In short, the factors which led this Court to equate a state highway to alienated fee land are simply not present in this case. The Ninth Circuit's extension of the Strate analysis to apply to a railroad right-of-way conflicts with the Court's other decisions which protect the continuing property interest of Indian tribes notwithstanding the grant of a conditional right-of-way across tribal land.

This Court's recent decision in El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473 (1999), supports the proposition that a right-of-way which is not open to the public or granted to the state is not the equivalent of fee land. In El Paso, this Court rejected the argument that Strate foreclosed tribal court jurisdiction over nuclear tort claims arising on tribal land leased to nonmembers. The Court distinguished Strate as a case dealing with "claims against nonmembers arising on state highways, [which] expressed no view on the governing law or proper forum when an accident occurs on a tribal road within a reservation. . . . By contrast, the events in question here occurred on tribal lands." 526 U.S. at 483 (citations omitted). Significantly then, the Court recognized that the land remained tribal land even though it was leased to a nonmember. As a practical and legal matter, there is no distinction between a congressionally granted right-of-way to a private entity such as a railroad, and a congressionally authorized lease of tribal land to a non-Indian mining company. The Ninth Circuit's decision to extend the analysis in Strate beyond state highways thus conflicts with this Court's subsequent decision in El Paso. Certiorari should be granted in order to resolve the conflict.

B. The Holding in Strate Cannot Be Extended to Civil Actions in Which Tribal Members Are Parties.

The Ninth Circuit's ultimate conclusion, that tribal courts lack jurisdiction to adjudicate reservation-based tort claims brought by injured tribal members, is an overly broad interpretation of Strate which, if it stands, would bring Strate into conflict with this Court's earlier decisions recognizing that tribal courts have jurisdiction to adjudicate reservation-based civil disputes between tribal members and nonmembers. In particular, the Ninth Circuit's characterization of Strate

conflicts with Williams v. Lee, *supra*; Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983); and Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9 (1987).

In Williams v. Lee, this Court held that tribal courts, not state courts, have jurisdiction over a dispute between a tribal member and a non-Indian over the collection of a debt on the reservation. Underlying the Court's holding in Williams was the notion that the treaty which created the Navajo Reservation established the reservation within the exclusive sovereignty of the tribe, and that the "treaty embodied 'the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed." Williams, 358 U.S. at 221-22 (emphasis added). The Court then clarified that it was "immaterial that the respondent was a non-Indian. He was on the reservation and the transaction with the tribal member took place there." *Id.* at 223. Williams, then, held that exclusive jurisdiction over an on-reservation dispute involving a tribal member and a nonmember was vested in the tribal court, and if this jurisdiction was to be limited, it was for Congress to do so. *Id.*; *accord*, Santa Clara Pueblo, 436 U.S. at 60; Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 149 (1982).

The Ninth Circuit should have followed Williams. Nothing in this Court's decision in Strate supports the notion that its holding should be extended to cases which involve injured tribal members. Strate involved a case between two nontribal members arising from a car accident on a state highway. Unlike Williams, no tribal members were parties to the dispute. As the Court in Strate noted, the dispute was "distinctly non-tribal in nature. It arose between two non-Indians involved in a run of the mill highway accident," and

"the Tribes were strangers to the accident." Strate, 520 U.S. at 457. The Ninth Circuit ignored these distinguishing factors, and extended Strate to apply to reservation-based claims brought by injured tribal members, in direct conflict with Williams, Mescalero, and other cases in this Court recognizing tribal authority to adjudicate disputes between tribal members and nonmembers.[3] This Court should grant certiorari to clarify that the ruling in Strate does not apply to reservation-based civil actions brought by injured tribal members.

C. The Ninth Circuit's Decision Conflicts with Acts of Congress and Federal Policy.

Not only does the Ninth Circuit's decision conflict with previous decisions of this Court, it conflicts as well with congressional and executive branch policy which recognizes and upholds tribal sovereignty in general, and strong tribal courts in particular. Congress has recently spoken on the issue of tribal court jurisdiction over non-Indians, and it is the obligation of the judicial branch to respect and defer to congressional policy in this area. Santa Clara, 436 U.S. at 60 ("a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent").

---

[3] *Accord*, Iowa Mutual, 480 U.S. at 18 ("Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute").

In the Indian Tribal Justice Act of 1993, Congress expressly reaffirmed the importance of tribal sovereignty and the role of tribal courts in promoting and preserving tribal sovereignty. 25 U.S.C. § 3601. In particular, Congress expressly stated that tribal courts are "an essential part of tribal governments and serve as important forums for insuring public health and safety and the political integrity of tribal governments," and that tribal courts are "appropriate forums for the adjudication of disputes affecting personal and property rights." 25 U.S.C. §§ 3601(5)-(6). The legislative history of the Indian Tribal Justice Act clarifies that Congress intended by these sections to reaffirm tribal court jurisdiction over non-Indian defendants whose conduct injures tribal members on the reservation. The Senate Report accompanying the Act states:

> [25 U.S.C. § 3601(6)] was added to emphasize that tribal courts are permanent institutions charged with resolving the rights and interests of both Indian and non-Indian individuals. The language tracks similar language of the Supreme Court in its ruling in Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), in which the Court stated that "tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication for disputes affecting important and personal property interests of both Indians and non-Indians.

Id. at 65.; S.REP. NO. 88, 103RD CONG. 1ST SESS. 8 (1993).

The House Report accompanying the Act also clarified Congress's understanding that Indian tribal courts retain the right to exercise civil jurisdiction within their territory,

including jurisdiction over the activity of non-Indians on reservation land in which the tribes have a significant interest. "Hence, non-Indians may be sued in tribal court." H.R. REP. NO. 205, 103RD CONG. 1ST SESS. at pp. 8-9 (1993).

Congress's policy in this area has been unwavering since the dawn of the self-determination era in the early 1970s. *See, e.g.*, Mescalero Apache, 464 U.S. 334-35 n.17 (and statutes cited); Iowa Mutual, 480 U.S. at 14-15 nn. 5 and 6. Current Executive Branch policy echoes the commitment of Congress:

> The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. In treaties, our Nation has guaranteed the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, trust resources, and Indian tribal treaty and other rights.

Exec. Order No. 13084, 63 Fed. Reg. 27655 (1998) (emphasis added).

The Ninth Circuit's decision below erroneously extends the holding in Strate to apply to actions which directly

involve tribal members and is contrary to federal policy and Congress's findings in the Indian Tribal Justice Act, as shown above. This Court should grant certiorari to resolve the conflict and bring the Ninth Circuit's decision in line with the expressed policy of Congress as stated in the Indian Tribal Justice Act.

The Ninth Circuit's extension of Strate's holding to apply to actions brought by tribal members who are injured as a result of the negligent acts of non-Indians on the reservation is also inconsistent with the 1968 amendment to Public Law 280, 25 U.S.C. § 1326. Under § 1326 Congress expressly required tribal consent (via a secretarial election) as a prerequisite to the exercise of state court jurisdiction over reservation-based actions involving tribal members. 25 U.S.C. § 1326. This Court has held that Pub. L. 280 does not preclude state courts from exercising jurisdiction when a tribe or its member "seeks rather than contests" state court jurisdiction to resolve a dispute between a tribal member and nonmember, because tribal self-government is not impeded in such a case. Three Affiliated Tribes v. Wold Engineering, 467 U.S. 138, 140, 149-51 (1984). However, § 1326 does indeed prohibit the judiciary from divesting tribal court jurisdiction and requiring a tribal member to seek redress in state court instead of tribal court against his or her will for a reservation-based claim. Before a tribal member can be forced to seek redress in state court, the tribe has to consent to the exercise of state court jurisdiction in accordance with the procedures outlined in § 1326. Kennerly v. District Court, 400 U.S. 423 (1971). Thus, the Ninth Circuit's holding that a tribal member cannot seek relief in tribal court but must instead seek redress in the state courts conflicts with Pub. L. 280, not to mention Williams and this Court's other decisions which have heretofore upheld the jurisdiction of

tribal courts to adjudicate actions between tribal members and nonmembers.

D. The Ninth Circuit's Decision Excusing the Parties from Exhausting Their Tribal Court Remedies Conflicts with this Court's Previous Decisions in National Farmers Union Insurance Co. V. Crow Tribe, and Iowa Mutual Insurance Co. V. La Plante.

The facts of National Farmers, *supra*, are identical in all material respects to this case. National Farmers involved a personal injury action brought by a Crow tribal member against a nontribal member. The cause of action occurred within the Crow Reservation on fee land owned by the Lodge Grass School District. 471 U.S. at 847. Thus, even assuming that the Ninth Circuit's decision to equate Burlington Northern's right-of-way with fee land is correct, the fact remains that this case is factually identical in all material respects to National Farmers. The Ninth Circuit nevertheless interpreted Strate to excuse exhaustion even though Strate did not involve a tribal member who was a party to the law suit. The Ninth Circuit's interpretation of Strate thus directly conflicts with this Court's previous decision in National Farmers. It also conflicts with this Court's later decision in Iowa Mutual, *supra*. Both cases required the parties to exhaust all of their tribal court remedies, including review in the tribal court of appeals, prior to a federal court entertaining the issue of tribal court jurisdiction. Both cases involved parties who were tribal members (Strate did not), and both cases arose within the boundaries of a reservation, either on fee land or on a right-of-way. There is simply no way to reconcile the Ninth Circuit's decision in this case with

the exhaustion doctrine as it has developed under National Farmers and Iowa Mutual. The Ninth Circuit's interpretation of Strate to divest the Crow Tribal Court of its jurisdiction in this case brings Strate into direct conflict with National Farmers and Iowa Mutual. The Court should accept jurisdiction to resolve this conflict and clarify what, if anything, remains of the exhaustion doctrine first announced in National Farmers.

This Court's recent decision in El Paso Natural Gas, *supra*, supports the notion that the Ninth Circuit should have required the parties to exhaust their tribal court remedies in this case. The Court explained the rationale underlying the exhaustion doctrine in El Paso:

> [National Farmers] was a suit involving the federal question jurisdiction of the United States district court under 28 U.S.C. § 1331, brought to determine whether a tribal court has the power to exercise civil subject matter jurisdiction over non-Indians. We held, initially, that federal courts have authority to determine, as a matter arising under federal law, whether a tribal court has exceeded the limits of its jurisdiction. After concluding that federal courts have subject matter jurisdiction to entertain such a case, we announced that, prudentially, a federal court should stay its hand until after the tribal court has had a full opportunity to determine its own jurisdiction. In justification of a prudential requirement of tribal exhaustion, we stated that the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that

> sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, executive branch policy as embodied in treaties and elsewhere, and administrative and judicial decisions. The same decisions of comity [in Iowa Mutual] provided the rationale for extending the doctrine to cases where a defendant in tribal court asserts federal diversity jurisdiction in a related action in district court. Exhaustion was appropriate in each of those cases because Congress is committed to a policy of supporting tribal self-government which favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal basis for the challenge.

El Paso, 526 U.S. at 484 (citations and quotations omitted).

Although El Paso held that exhaustion was not required in that particular case, it did so only because of a "unusual preemption provision" of the Price Anderson Act, under which Congress had preempted state and tribal court jurisdiction over nuclear tort claims. 526 U.S. at 584-85. No such congressional act preempting tribal court jurisdiction is at issue in this case. On the contrary, the only congressional statute which arguably is relevant here is the Indian Tribal Justice Act, and that Act expressly supports the existence of tribal court jurisdiction over this case.

A review of the procedural history of this case, as outlined in the Petition for Certiorari, illustrates that it has become the exact procedural nightmare that this Court in National Farmers sought to avoid. This Court should grant

the Petition for Certiorari to resolve the conflict created by the Ninth Circuit between Strate on the one hand, and National Farmers, Iowa Mutual, and El Paso on the other.

II. This Court Should Grant Certiorari Under Rule 10(a) Because the Ninth Circuit's Decision Conflicts With Decisions of Other Court's Of Appeals.

The Ninth Circuit's decision below conflicts with the Tenth Circuit's decision in Kerr-McGee Corp., *supra*. In Kerr-McGee, the Tenth Circuit held that exhaustion of tribal court remedies was required in a case where tribal member plaintiffs sued a nonmember in a reservation-based tort action. In the course of its holding, the Tenth Circuit recognized that strong tribal interests were implicated by the tribal members' claims. The mill that allegedly produced the toxic and radioactive waste was located on the reservation pursuant to a tribal lease, and the alleged victims of the tort were tribal members residing on the reservation. In such cases, the Tenth Circuit noted that the "tribal nexus is strong, as is the interest of the tribe as a sovereign in protecting and vindicating the rights of its residents." More important, the court discussed the implications of Strate and Montana on its holding:

> Even Strate and Montana, cases that curtailed tribal authority over non-Indians, recognized that tribes retain a core sovereign interest in protecting the health and welfare of the tribe such that they may regulate non-Indians on all lands within the reservation. This appears to be such a case.

Kerr-McGee, 115 F.3d at 1508.

By contrast, the Ninth Circuit below was blind to the fact that tribal members who resided on the reservation were victims in this case, and failed to recognize that this factor, a factor not present in Strate, implicates the significant tribal interest in not only protecting the health and welfare of tribal members, but in providing a judicial forum where tribal members can seek redress for their injuries caused as a result of the negligence of non-Indians on the reservation. These are the exact same considerations that underlie the Supreme Court's decision in Williams v. Lee, *supra*.

Moreover, the Ninth Circuit's analysis in this case is in conflict with the Eighth Circuit's *en banc* decision in Strate, which this Court ultimately affirmed. A-1 Contractors v. Strate, et al., 76 F.3d 930 (8th Cir. 1996), *aff'd*, 520 U.S. 438 (1997). Although the Eighth Circuit held that the tribal court lacked jurisdiction in Strate, the court rested its holding on principles much more consistent with the Supreme Court's other precedent in the area of tribal jurisdiction. The Eighth Circuit recognized that this Court's decision in Montana v. U.S. was seemingly at odds with the Court's other decisions like Williams v. Lee, Iowa Mutual, and Merrion. In its *en banc* decision, the court harmonized the two seemingly conflicting lines of cases:

> Arguably, some of the language from Iowa Mutual, Williams, and Merrion can be viewed in isolation to create tension with Montana. A careful reading of the particular language of those cases, however, indicates that they can and should be read together with Montana to establish one comprehensive and integrated rule: a valid tribal interest must be at issue before a tribal court may exercise civil jurisdiction over a non-Indian or nonmember,

> but once the tribal interest is established, a presumption arises that tribal courts have jurisdiction over the non-Indian or nonmember unless that jurisdiction is affirmatively limited by federal law. This rule is supported by the above authority and by the leading treatise on American Indian law, which specifically states: "Tribal courts probably lack jurisdiction over civil cases involving only non-Indians in most situations, since it would be difficult to establish any direct impact on Indians or their property." This well accepted rule controls this case.

76 F.3d at 938-39 *quoting* Felix S. Cohen's Handbook of Federal Indian Law, 342-43 (1982 Ed.).

The *en banc* court went on to conclude that no valid tribal interest existed in A-1 Contractors because the dispute was "exclusively between non-Indians involved in [a] run-of-the-mill [highway] accident" making the dispute "distinctively non-tribal in nature." *Id.* at 940. In affirming, this Court recognized the same principle. 520 U.S. at 457.

The Ninth Circuit's decision below strays far beyond the principles identified by the *en banc* Eighth Circuit decision in A-1 Contractors, principles which were implicitly accepted by this Court in its affirmance. The holding in Strate can not be extended to civil actions brought by injured tribal members. In the latter case, tribal courts presumptively have jurisdiction as Williams, Iowa Mutual, and Merrion all hold. This Court should grant the Petition for Certiorari and harmonize Strate with Williams, Iowa Mutual, Merrion and the numerous other cases decided by this Court which uphold

tribal sovereignty in cases where the interests of the tribe or tribal members are directly implicated.

III. This Court Should Grant the Petition for Certiorari Because the Ninth Circuit Has Decided an Important Question of Federal Law That Has Not Been, But Should Be, Settled by this Court.

As the above discussion illustrates, the Ninth Circuit has extended the holding in Strate to apply to reservation-based civil claims brought by injured tribal members in tribal court. No case in this Court has ever decided that tribal courts lack civil jurisdiction over such cases. Strate only involved a tort action between two nonmembers. Such a case does not implicate any tribal interest because it did not involve tribal members who were killed as a result of the negligent conduct of a non-Indian on the reservation. Prior to Strate, the decisions of this Court and the lower courts were uniform in upholding tribal jurisdiction over actions where tribal members were parties in a dispute against nonmembers.[4] The conflicts which the Court's decision in Strate has created in the lower courts has led to increased litigation where judges, particularly tribal court judges, must decide jurisdictional challenges in nearly every civil case filed by tribal members against nonmembers on the reservation. The courts facing these jurisdictional challenges have in many cases reached different and anomalous results. For example, after Strate the

---

[4] *E.g.*, Williams v. Lee; Iowa Mutual; National Farmers; Santa Clara, *supra*; Hinshaw v. Mahler, 42 F.3d 1178 (9th Cir. 1994), *cert. denied*, 513 U.S. 988 (1994); Babbitt Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587 (9th Cir. 1983), *cert. denied*, 466 U.S. 926 (1984).

Ninth Circuit has held on the one hand that an Indian tribe retains the power to regulate non-Indian use of water on non-Indian lands within the reservation. Montana v. U.S. EPA, 137 F.3d 1135 (9th Cir. 1998), *cert. denied*, 525 U.S. 921 (1998). On the other hand, the Ninth Circuit in the case below, and in at least one other case, has also held that an Indian tribe cannot provide a judicial forum for its own members who are injured or even killed due to the alleged negligence of nonmembers on reservation lands. *See* Wilson v. Marchington, 127 F.3d 805 (9th Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998). The Supreme Court should grant certiorari to clarify that Strate does not extend to reservation-based claims brought by tribal members who are injured as a result of the allegedly negligent conduct of nonmembers on reservation land.

CONCLUSION

The Respondent Crow Tribe respectfully requests that the Petition for Certiorari be granted, and that the Ninth Circuit's decision divesting the tribal court of its jurisdiction, and holding that exhaustion of tribal court remedies is not required, be reversed.

/s/_____
FREDERICKS, PELCYGER & HESTER, LLC
Robert S. Pelcyger
John Fredericks III
Counsel of Record
1075 S. Boulder Rd. Suite 305
Louisville, CO 80027
(303) 673-9600
Attorneys for Respondent Crow Tribe